Supreme Court of the U. S.

October Term, 1879.

No. 792—Docket, 1879.

THE STATE OF LOUISIANA, EX REL. SOUTHERN BANK,

vs.

CITY OF NEW ORLEANS,
EDWARD PILLSBURY, MAYOR OF NEW ORLEANS,
JULES C. DENIS, ET AL. ADMINISTRATORS,
JOHN J. WECKERLING, ET AL. INTERVENORS.

Writ of Error to the Supreme Court of Louisiana.

BRIEF IN ACCORDANCE WITH 21st RULE OF THE COURT.

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A STATEMENT OF THE FACTS.

The City of New Orleans was incorporated in the year 1805, and remained under one municipal government until May, 1836. In 1836 three municipalities were formed of its territory, each of which had corporate powers, and had separately a council,

treasury, police and territory, and separately the capacity to hold property and to make contracts. Under these three corporations the city was governed until February, 1852. In 1852 it was deemed politic to reunite these fragments and to add the adjacent city of Lafayette to them, and thus an Act was passed by the General Assembly "To consolidate the City of New Orleans and to provide for the government and administration of its affairs;" with a supplement relative to Lafayette; being Acts Nos. 71 and 72 of the session, and approved 23d of February, 1852. The sections thirty-seven of Act 71, and five of Act 72 have reference to the adjustment of the debts of these four corporations, and of the old corporation of New Orleans prior to 1836. The sections are copied into the petition. Record, pp. 1, 2, 3. Other statutes and some reported cases, as well as the testimony in the cause, disclose that at the dissolution of these corporations their financial affairs were in great disorder, and indicated a past career of improvidence, extravagance and bad management, leaving a burden of debt and discredit. The Legislature had sanctioned several abortive measures for relief, such as authorizing sales of bonds, pledges of property and a board of liquidation. The measure of 1852 was resorted to, apparently, as the only remedy. The sections thirty-seven and five embody the plan of arrangement for the debts. The debts of the five corporations, viz: old city of New Orleans, three municipalities and Lafayette are charged to the consolidated city of New Orleans; Commissioners detailed from the officers of the new government were required to ascertain the amount of the indebtment of each, and for this amount to issue the negotiable bonds of the city to the creditors, in exchange, or to sell the bonds and make payment. The Mayor, Comptroller and Chairman of the Finance Committee constituted this commission; these bonds composed "the consolidated debt," and a tax to be levied exclusively for the payment of interest and principal was the "consolidated loan tax." This tax was to be for $650,000

annually. The Council of the city was to pass an ordinance in January of each year, as the first duty of the Council for its assessment, and the sum was to be levied upon the *real estate and slaves* within the respective municipalities and sections, *in proportion to their indebtedness.* No other evidence of debt was to be issued by the corporation for any purpose, and the failure to pass this ordinance as required, involved the nullity of the ordinances, resolutions and acts of the corporation until it shall have been passed. In the spring succeeding the passage of this Act, the officers of government were elected and the city organized. Several years were employed in the arrangement of these debts. The consolidated debt amounted to some eight or ten million dollars. There are outstanding now bonds for about $4,380,000. The consolidated loan tax was annually collected until 1874 with reasonable fidelity. In 1874 the Legislature granted a respite in the collection of the sinking fund for that year and the year 1875.

In 1876 Act No. 31 was passed by the Legislature. This Act repealed all prior laws for the collection of any tax for principal and interest, except of a class of bonds called premium bonds, then authorized for the first time, and repealed Acts conferring jurisdiction on the Courts to enforce any law providing for taxation and repealed by that Act. The 7th section of that Act is copied in the petition. The premium bond plan originates in the ordinances of the city referred to in Act No. 31. The corporation proposed to settle all of its debts with its own bonds of twenty dollars each, bearing interest at the rate of five per cent. per annum, until paid. Semi-annually, a tax was to be distributed by lot among the holders of the bonds, the fortunate drawer of a prize to be paid in full.

As an adjunct to this plan, fifty thousand dollars were distributed in the form of premiums or prizes through a lottery, in sums of $5,000, $1,000, $500, $100, $50, $20, in which the holder of every bond had a chance. It was supposed the debts of the city might be paid in a half century on this plan.

Semiannually

This form of negotiation of loans has been practised in several instances in France, by such States as Mexico, but without a license from the government of France. The Court of Cassation has determined it offended the laws prohibiting lotteries.

Credit Foncière: Journal du Palais, to. 77. p. 909. Year 1866 and note.

This novel form of payment of old debts is original with the Council of New Orleans. The case of Maenhaut, reported in 2 Wood's C. C. R., 108, was pending at the date of this Act, and the opinion of the Court upon the 37th section of the Act of 1852 had been delivered. The suit in the Third District Court was commenced as a consequence of the Act No. 31 by the Southern Bank as a relator.

II.—THE PLEADINGS, EVIDENCE AND JUDGMENTS.

The suit in the Third District Court is by a petition for a *mandamus* to enforce the collection of the "Consolidated Loan Tax," as provided in the section 37 of Act 71, and section 5 of Act 72. These sections are copied in the petition, pp. 1, 2, 3, and show that the corporation was bound to impose a special tax for a specific sum, annually, for the payment of the interest and principal of the consolidated debt of New Orleans. This ordinance had not been passed, nor the tax collected during or since 1876. A demand had been made and neglected. A holder of bonds is the relator. The application is for a writ in the name of the State. The petition discloses the fact that the General Assembly had passed the Act No. 31 of the Acts of 1876, which commands that no tax for the payment of interest or principal of any bonds, other than the premium bonds, should be collected in 1876 or thereafter, and that all laws providing for such taxes be repealed.

This act is charged to be a violation of the Constitution of the United States, as impairing the obligation of the contract under which the consolidated bonds was issued and transferred to the holders.

The defendants and certain Intervenors joining them answer:

1. That the sections of the Acts of 1852, Nos. 71, 72, are inoperative and null; that the Constitution of Louisiana of 1845, which was then in force, requires the object of the Act to be expressed in the title of the Act; and that the two sections are not comprehended in the title of these Acts.

2. That the Constitution of 1845, as well as that of 1852, requires that taxation shall be equal and uniform throughout the State; but that the "consolidated loan tax" is to be levied on real estate and slaves, and not upon other property; and the rate per cent. of said tax in each municipality, is to be in proportion to the indebtedness of each, whereby that Constitution is violated.

3. The defendants plead the Act No. 31, approved 6th March, 1876, as repealing the Acts, No. 71 and 72, and liberating the City Council from the duty of making the assessment specified in the sections of that Act as set forth in the petition of the plaintiffs.

4. The defendants plead that Act, and the section five of the Act No. 5, of the Acts of the extra session of 1870, as prohibiting the Courts to issue the writ of mandamus to enforce the execution of the contract described in the petition of the plaintiffs. (Record, pp. 12, 14.)

The District Court, after an elaborate examination, awarded the writ. (Record, pp. 113–143.)

This judgment was reversed in the Supreme Court upon appeal. (Record, p. 109.)

The opinions of Justices Marr and Leblanc, are in the Record, pp. 155–193. The dissenting opinion of Chief Justice Manning. (Record, p. 197.)

III.—ASSIGNMENTS OF ERRORS.

The plaintiff assigns that the Supreme Court of the State of Louisiana, erred in reversing the judgment of the Third District Court which determined that the plaintiff had established a valid contract between the city of New Orleans and the holders of the consolidated debt of that city, for the levy and collection of the tax specified in the sections of Acts, Nos. 71 and 72, copied in the petition; and that the obligation of the contract had been impaired by the Acts pleaded by the defendants contrary to the 10th section of the 1st Article of the Constitution of the United States, and in dismissing the petition of the plaintiff with costs.

2. The plaintiff assigns for error in the said judgment, that the plaintiff established that the city of New Orleans had issued a series of bonds called "the Consolidated City Debt," in the 37th section of the Act, No. 71, of 1852, which were in circulation, and some of which owned by the plaintiff; that the city of New Orleans had failed and refused to pass the ordinance for the levy and collection of the special tax described in that section of the Act, and the 5th section of the Supplemental Act, No. 72, of the year 1852, for a term of years, and had failed and refused to pay the annual interest on the bonds issued: and that the Supreme Court had supported and sanctioned the refusal of the said city in their default aforesaid, upon the pleas made by the defendants, and that they were absolved from the performance of the said duty, under statutes of the State pleaded by the said city of New Orleans. And the plaintiff avers that the statute No. 31 of the Legislature of Louisiana, and the judgment of the Supreme Court of Louisiana, impair the obligation of the contract between the city, acting under the authority and mandate of the State in making the same, and the holders of the consolidated debt of New Orleans; and that the plaintiff is entitled to the judgment as rendered in the Third District Court, and this

the plaintiff is ready to verify. And therefore prays this Court to render judgment in favor of the plaintiff annulling said judgment of the Supreme Court, and to render a judgment allowing the prayer of the petition, and that the defendants be taxed with the costs of this suit.

IV.—POINTS AND CITATION OF AUTHORITIES.

I.

The historical statement relative to the incorporation of the inhabitants of New Orleans, under a municipal government in 1805, and their continuance under it till 1836; the division of the city into three sections or municipalities, each having corporate powers with faculties to hold property, contract debts, support a police, and to regulate their affairs by a council, and the protraction of this mode of administration and rule until 1852; the disastrous failure of this experiment of disunion, and the urgency for a consolidation of these fragments under an orderly and efficient administration and government in 1852, sufficiently explain the conditions under which the Act of 1852 was adopted, and why there were three or four classes of debt and a difference in the amount of the indebtedness of the several sections, and the necessity for a consideration of the equitable claims of each. It must be observed that when the Legislature in 1836, capitulated under the fatigue of the petulant complaints and murmurs, the jealousies, rivalries and strifes of these sections of the same city and consented to the division, it had a prevision there would be a day of penitence and remorse. In the Act passed to effect the separation, there is a declaration that in case of a reunion each municipality shall pay its own separate debts.

Bullard and Curry's Dig., p. 128, secs. 24, 25; p. 128, sec. 3.

The legislative Acts during this term of separate self-government, and some reported cases, show their condition was that of distress, and discredit bordering upon insolvency.

Acts 1847, p. 14, No. 102.

Acts 1850, p. 169, No. 169.

Acts 1852, p. 42.

Board of Liquidators vs. Municipality one, 6 Ann., 41.

II.

The debt of the old city—the city existing from 1805 till 1836—had been apportioned or arranged for in 1836. There were three embarrassed municipalities to be dissolved, and there was the city of Lafayette to be annexed to the consolidated New Orleans. These had extraordinary advantages of position and connections, and were paralyzed by reason of a career of wilfulness, improvidence and prodigality. Their creditors were complaining of broken contracts, and suffering from their impoverishment. The task imposed upon the Legislature was to restore financial order and public confidence, maintain the obligations to creditors, and renew commercial prosperity, with a proper regard to the rights of the municipalities and the population. The Act entitled "An Act to consolidate the city of New Orleans and to provide for the government and administration of its affairs," and the supplement to it, were framed by able men, to accomplish these results. The Minister of Finance of the first administration under the Union of the U. S, reported, as the condition for credit and confidence, the maintenance of good faith and the punctual performance of contracts. "States, like individuals who observe their contracts, are respected and trusted, while the reverse is the fate of those who pursue an opposite course of conduct." Section 37 provides that the entire indebtedness shall be ascertained by a board composed of officers of the city, and that this entire debt shall be liquidated and settled by the issue of bonds of the consolidated

city. This was to be "The consolidated debt of New Orleans." In the same section, the corporation was prohibited from issuing any other *evidence* of debt, and forbidden to borrow money unless under rigid restrictions, and after the sanction of a popular vote, and security for payment should be given at the time. The opinion of the Supreme Court does not challenge the settlement by the issue of bonds nor the restrictions imposed upon the corporate authorities.

III.

But the adjustment of the debts of the old city and of the municipalities, by the issue of bonds and the pledge of property had been attempted in other Acts of the Legislature we have referred to. The inquiry of the creditor went beyond, and he sought information as to the mode of payment. The General Assembly was charged with the duty of designating the ways and means. The bonds went forth in the name, and imposed an obligation upon, the entire city. But these debts had been created by municipal corporations that were separate, and had become indebted with no claim upon their neighbors for contribution. In authorizing these corporations to combine and form a single corporation, and to have the same government, there was no obligation nor duty imposed upon the Legislature to relieve either one of the municipalities, or its inhabitants, from the charges resting upon them. The Constitution of the State is silent on this subject. The subject is one entirely committed to the legislative discretion and judgment. The tribunals of justice have no power of revision over such Acts of the Legislature. This Court has placed this question outside of the reach of controversy.

Laramie Co. vs. Albany Co., II Otto, 307.
1 Dill. Corp. Ch. VIII, 126-7-8.
Cooley Con. Lim., sec. 126.
29 La. Ann., 608.

IV.

The Act of 1852 embodied the provisions which legislative discretion and forecast determined to be suitable for the promotion of the prosperity of the consolidated city and the distribution of right and justice among the inhabitants of the respective sub-divisions which were now reconstructed.

The Act required the assessment of *a special tax*, to be called the *consolidated loan tax*, and to be pledged to the payment of the interest on the consolidated bonds, and for the reduction of the principal whenever there was a surplus to be used for that purpose.

This tax was to be levied on land and slaves, and to be apportioned among the municipalities and sections of the city in proportion to the amount of their indebtedness, as determined by the commissioners designated in the Act. The case shows that this tax bore more severely upon one municipality than upon another, for the reason that one municipality was more in debt than another. It is true, that property on one side of Esplanade or Canal street—the division lines of the municipalities—of equal value, was subject to different rates of taxation under this section of Act No. 71. The reason for this is, that the debts of these independent municipalities were materially different in amount, and as distinct municipalities the rate of taxation necessarily varied from this cause. The Legislature, in consenting to the consolidation of these distinct corporations into one community, for their common welfare, determined that this mode of apportioning the burden was legitimate and proper, and in this form the union was effected. The inquiry arises, how was this regarded at that time, and what was done about it?

V.

What was the process by which consolidation was made? What was said or done about this apportionment of the debt? The Act No. 71 was approved 23d February, 1852. During

the session, the power of the municipalities to contract debts or pay money was suspended. A special Act was passed to have an election for the officers of the new government, after notice, and the board of liquidation was ordered to account and surrender its accounts and effects. There was no surprise, secrecy nor circumvention

Acts 1852, Nos. 115, 116, 142.

The consolidation took place, the indebtedness ascertained, the bonds were accepted and circulated; the largest payment was made in 1854, two years after the Act was passed. During all of this period there is not the slightest evidence that a single person deemed that there was inequality or injustice in the conditions of the Act, or that the Constitution of the State had been violated. The creditors surrendered to the Commissioners their claims and the corporation fulfilled the commands of the Act in the collection and the application of the money from the special consolidated loan tax.

Every owner of land and slaves was advertised of the tax by the bill which was annually presented to him for payment. Not a plea of illegality was made in a number of cases when tax bills were contested in the Supreme Court; and this item appears distinctly in the report to our own view now, a quarter of a century and more after the event.

New Orleans vs. Cochrane, 8 Ann.
Same vs. Solomon, 10 Ann., 454.
Same vs. Locke, Ibid., 730.
Same vs. Cannon, Ibid., 764.
Same vs. Codeville, Ibid., 732.
Same vs. Halpman, 11 Ann., 145.
Richardson vs. Morgan, 16 Ann., 429.

In a single case of manifest hardship this consolidated loan tax was called in question for the apparent and particular hardship. New Orleans vs. Michoud, 10 Ann., 763. The Court in this case and in each of the other cases gave judg-

ment for the city for the amount of the tax. The solution of the recondite and impenetrable mystery of the title of the enactment and its repugnance to the 118th Article of the Constitution of 1845, and the discovery of the want of that uniformity and equality of taxation which Article 127 of the same Constitution exacts, are wholly due to the profound and abstruse studies which the premium bond scheme of the financiers of the City Council of 1874-5 have educed. The first publication of the results will be found in Maenhaut's case, reported in 2 Woods, C. C. R., 108, and in the answers filed in this case.

VI.

The statesmen who framed the Act of 1852 had the opinion that the punctual fulfilment of their obligations and the maintenance of good faith by the municipal authorities of New Orleans was a duty incumbent upon them. They esteemed it a primal duty, and ordained that their ordinances, resolutions and acts should be null and void until this duty shall have been performed. The authorities obeyed the command of section 37 with much fidelity till 1874; since then the duty had become irksome and finally they decided there was no duty at all. In 1875 they pleaded in Maenhaut's case that an Act that provided for "the consolidation of New Orleans and for the government and administration of its affairs" would not, to an average legislator or citizen, afford notice that the settlement of debts by means of taxes was embraced as an object of the Act.

The Jonathan Wild, who deemed "borrowing the genteelest mode of acquiring" property, or the Ancient Pistol, who said "Base is the slave who pays," might not apprehend a call for taxes to pay city debts from such a statute, but the Supreme Court in this case overruled this plea of the City Council—deeming the title sufficient. Record, pp. 172, 173.

City of Shreeveport vs. Jones, 26 Ann., 708.

Municipality vs. Michoud, 6 A., 675.

23 Ann., 743.

VIII.

The Supreme Court did sanction the objection to that clause of the section 37, which directed the levy of the special tax upon lands and slaves, and the apportionment of the tax levied among the sections of the city, in proportion to the indebtedness of each, for the reason that the assessment was not equal or uniform under the 147th Article of the Constitution of 1845, and which is the 123d Article of the Constitution of 1852. The opinion of the Court seems to imply that the selection of the two subjects of taxation, real estate and slaves, violates the article, but, that the apportionment of the tax among the municipalities so as to bear unequally, is without a peradventure, illegal. That there may be an assignment or pledge of specific taxes for the security or payment of the principal or interest, or both, of debts is unquestionable. This was done by the United States in its adjustment of the public debt in 1790, and in a number of instances since that date. These taxes were imposed upon specific subjects, apart from the taxes imposed for revenue purposes. The land tax in Great Britain, has long ago been pledged for the same purpose. In the reign of Henry III, the king assigned the whole body of the Jews as security, to be tallaged for the payment of a loan. Nor do we understand why there should not be a selection of the objects of taxation under the terms of the Constitution of 1845? The Article 147 of the Constitution, definitely excludes the conclusion that there shall not be a selection of subjects, or that taxation shall be universal. The Constitution is, "Taxation shall be equal and uniform *throughout the State.*" After the year 1848, all property *on which taxes shall be levied*, shall be taxed in proportion to its value. * * * No one species of property shall be taxed higher than another species of property of equal value, "*on which taxes shall be levied.*" In the case of Municipality vs. Duncan, 2 Ann., 183, where a special tax was limited to land, the Court said:

"It does not appear to us that the power given to tax real estate and personal estate, render it imperative on the corporation to tax BOTH." And a case of taxation arising under this Constitution, the Court said: "To be uniform, taxation need not be universal—certain objects may be made its subjects, and others may be exempted from its operation. Certain occupations may be taxed for a greater amount, and others for a less, but as between the subjects of taxation, in the same class, there must be equality."

Succession of Poydras, 9 Ann., 165.

This statement of the meaning of the Constitution is sanctioned by a current of authority in Louisiana extending over a long period of time.

The State vs. Lathrop, 10 Ann., 398.
New Orleans vs. Com. Bank, 10 Ann., 736.
Parker vs. Scogin, 11 Ann., 629.
Wallace vs. Shelton, 14 Ann., 434.
State vs. Fosdick, 21 Ann., 434.
Honold vs. New Orleans, 23 Ann., 726.
Whittid vs. Lewis, 25 Ann., 568.

Burroughs, in his work on Taxation, considers whether a State, whose Constitution provides for uniformity and equality, could place the burden of taxation exclusively on real estate or other species of property? He says, the question has not been raised; but, without a clause to prohibit discrimination, the Legislature might do so.

Burr on Taxation, 65, 66.
Oakey vs. Mayor, 1 La., 1.

In Louisiana, the tax imposed by the municipal corporations, including New Orleans, to pay for subscriptions of stock in railroad companies, were levied on real estate only. There was

an earnest, vehement and abortive contest in the Supreme Court on the part of the owners of land. The tax was maintained.

Police Jury vs. McDonogh, 8 Ann., 128.
New Orleans vs. Grailhe, 9 Ann., 563.
New Orleans vs. Romes, 9 Ann., 573.
Parker vs. Scogin, 11 Ann., 629.

IX.

Upon a concession that this article of the Constitution is universal in its application to all taxation by municipal or territorial authority in the State, as well as to the State, what we have said is conclusive upon the validity of the consolidated loan tax. But the language of the Constitution is, "That taxation shall be uniform and equal throughout the State." These terms in Louisiana are understood to refer entirely to taxation by the State, and not to municipal taxation. This was determined, in 1847, by the Supreme Court in the case, before cited, of Municipality vs. Duncan, 2 Ann., 182, where the tax imposed by the municipality was confined to real estate.

The decision was rendered by Chief Justice Eustis, who said:

"The objects of the imposition of this tax are within the lawful powers of the municipality and proper subjects of administration. The tax itself is said to be unconstitutional, it being in conflict with Article 127 of the Constitution of 1845. The Article, by its very terms, applies to State, and not to municipal taxes. It provides for equality and uniformity of taxation *throughout the State.* As an approximation to either of these objects would be impossible without a general valuation of the property to be taxed, the Article provides for the postponement of its operation until after the year 1848, thus giving time to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on

real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance."

Referring to the power of the Court to control the arbitrary exercise of the right of taxation, and in view of the inapplicability to the municipality of the Article 127 of the Constitution, the Judge said:

"In conclusion, it may not be out of place to state that, as the guardians of the rights and property of citizens, we should fail in our duty if we were to forbear to exercise our power on any proper occasion to protect them from spoliation: at the same time it must be confined to its constitutional limits, and to those cases in which its authority cannot be questioned, and its action will consequently be effectual."

The opinion of the Court in this case of Duncan is impugned in the reasons assigned for the judgment in this cause, by the Supreme Court, and its authority rejected. It is said in effect the opinion was not called for by the case. The report shows that the question of inequality was made there, as it is made in the answers in this case. A special tax was imposed upon real estate alone. The constitutional clause was invoked. The Court states, as a historical fact, that the Convention which, not long before, had made the Constitution, had deemed it proper to regulate taxation *throughout the State*, and to leave municipal and local taxation to legislative control, as before, and that the section in the Constitutional limitation was confined to taxation *throughout the State*. The Chief Justice was the most conspicuous and laborious member of that convention, and two of his associates were coadjutors. None doubted his statement of the fact. Such is the fair interpretation of this Article.

Gilkerson vs. Frederick, 13 Gratt., 577.

Washington vs. State, 13 Ark., 351.

This conclusion has been fully incorporated into the law of the State as an authorized and proper interpretation. This case is cited with approbation in

Lafayette vs. Cummings, 3 Ann., 673.
Buffington vs. Dinkgrave, 4 Ann., 472.
Gillespie vs. Police Jury, 5 Ann., 405.
Bodelin vs. Lewis, 8 Ann., 472.
The State vs. Poydras, 9 Ann., 165.
The State vs. Lathrop, 10 Ann., 398.
Yeatman vs. Crondell, 11 Ann., 145.
Jamison vs. New Orleans, 12 Ann., 346.
Wallace vs. Shelton, 14 Ann., 498.
Selby vs. Levee Co., 14 Ann., 434.

Inexperienced members of a newly-elected Court, composing a bare majority, questioned the opinion in Duncan's case, and decided the case of Municipality vs. White, 9 Ann., 446, adversely to it. But this case was overruled in Yeatman vs. Crondell, 11 Ann., 145. One of the three Judges who joined in the decision of White's case recanted and disavowed the doctrine of that case. Judge Spofford delivered the "readjusting and reconstructing" opinion which settled the law of the controversy. No single question has a more consistent and cogent support than that which was determined in the case referred to, and all we can admire in this case is the mental intrepidity of the City Council which could have pleaded the adverse plea, and of the Court that could have sustained it, in the despite of such authority. It has been remarked, that no *inhabitant* of New Orleans, who had been assessed to pay the tax, has, at any time, made the same plea, and that the authors of that remarkable scheme, of the premium bond scheme for paying debts, is the first council that has opposed the assessment and collection of the tax.

XI.

We have now adduced testimony that the jurisprudence of Louisiana for the entire period, when the Article 127 of the Constitution of 1845, continued by Article 123, by the Constitution of 1852, formed a part of the organic law of the State of Louisiana, has consistently determined that the General Assembly was unfettered by constitutional restrictions or regulations in respect to municipal or local taxation, and had power to determine what subjects should bear the burden of taxation throughout the State. This jurisprudence was familiar to the jurists who prepared the Act "to consolidate the city of New Orleans, and to provide for the government and administration of its affairs." It not likely that Benjamin, Bradford, Micou, Slidell, Robb, should have been mistaken, any more than Eustis and Rost, who joined in the decision of the case of Municipality *vs.* Duncan, 2 A., 183, could be mistaken. The *consolidated loan tax* as settled by the sections of the Acts 71 and 72, had never been questioned in the Supreme Court, until the judgment was delivered on the 30th December, 1878.

XII.

During the year 1856, petitions were made to the Legislature which represented that taxation in New Orleans was burdensome, and that there might be equality in the assessments.

An amendatory and enlarged Act, of 134 sections, was adopted as Act 164, p. 136, of that year. Three sections reaffirm the enactments relative to "the consolidated debt" and "consolidated loan tax." The section 117, reënacts the provisions in respect to them of section thirty-seven of the Act, No. 71, 1852; secs. 42, 117, 118.

In the year, 1870, a new charter for and a different organization of the government of New Orleans, was made. This

exempted the bonds from taxation; reserved all of the rights, trusts and uses which were conceded in the previous laws, and imposed penalties upon those who should divert the money from its legal destination.

Acts 1870, p. 7, secs. 34, 44, 50.

Banking organizations may be formed for circulation of bills, by subscription of capital and deposit of securities with the auditor for the redemption of the bills. These consolidated bonds are designated as available securities in the same order with bonds of the United States and the State. The Southern Bank was so organized and made the deposit of consolidated bonds. Rev. Statutes, 286.

We count fourteen statutes referring to the consolidated bonds, and accrediting and providing for them. 1852, Nos. 71, 72; 1854, Nos. 108, 109, 110; 1855, No. 156; 1856, No. 164; 1859, No. 133; 1860, No. 3; 1869, No. 49; 1870, No. 7; 1874, No. 53.

In 1876, the City Council brought forward their premium bond plan, and procured its adoption by the enactment, No. 31, approved 24th March, 1876; the 7th section of which obliterated these statutes and prohibited the collection of taxes to pay interest or capital, and mutilated the judicial power of the State, so as to coerce creditors to accept the illusory and vicious scheme they had propounded. If there had been inequality in the assessments, the Legislature was competent to make them equal.

The bondholder has no interest in objecting to any act ameliorating the taxation which does not impair the successful collection of the sum of money which the city agreed to collect.

The Act of 1870, did provide for a consolidation loan tax to be levied equally and uniformly upon all of the taxable property.

Such a tax, as among tax payers, is free from any objection from them.

Layton vs. New Orleans, 12 Ann., 515.
St. Louis vs. Shields, 52 Missouri R.

But these Acts are all repealed by the agency of the city authorities. The owners of the consolidated debt were thus thrown upon the contract as made in 1852.

The complaint of hardship and oppression of an unequal tax, has its foundation in the ill-advised acts of the corporation and the State, and the remedy is within their reach at any time when they shall relinquish the opinion that their power over contracts and remedies to enforce contracts, is unlimited.

XIII.

The legal impossibility of a collection of a tax like that imposed in section 37 had not been discovered until the opinion of the Supreme Court was delivered. We have cited cases in the Supreme Court where such a tax was adjudged legal, and a judgment for the amount of the assessment rendered. The Supreme Court have decided that Legislative Acts, made under the Constitutions of 1845 and 1852, which discriminated between urban property and rural property within the limits of the same city, were valid and operative. The power of apportioning taxation, of designating the objects, persons, localities subject to the burden to be imposed, is without limitation except by the Constitution. The Constitutions of 1845 and 1852 contained no restriction.

New Orleans vs. Phillipi, 9 Ann., 45; 10 Ann., 763.
1 Ann., 162. M.

The result of this examination is to confirm the conclusions of the General Assembly of Louisiana, and of the corporation of

New Orleans and the inhabitants of New Orleans, and of the creditors of New Orleans, who had dealings with the State, the city and the inhabitants, that the 37th section of the Act of 1852 is constitutional and valid, and that the action of these political bodies and individuals during a quarter of a century was not contrary to the fundamental law of the State.

The error committed is to be found in the judgment of the Supreme Court of the State of Louisiana we have complained of.

PART SECOND.

I.

We have considered and disposed of the objections made in the answers of the defendants to the sections of the Acts 71 and 72 copied into the petition, and have found that the Legislature of the State did not infringe the Constitution of the State by adopting and promulgating them as law to the city of New Orleans.

These sections embody an overture to the creditors of the city to accept in payment of acknowledged and ascertained debts of the sections of the city negotiable bonds of the consolidated city, which were to be secured by a special tax on specific property in the city, to be annually imposed and collected for that and no other object. These bonds when exchanged with the creditors for their demands, or sold to purchasers for money to be so applied, establishes in favor of the creditor or purchaser a right to the security offered and to the fulfilment of the contract.

Maenhaut vs. New Orleans, 2 Woods C. C., 108.
Smith vs. Appleton, 19 Wiscon., 468.
10 Calif. R., 563; 7 Calif., 579.
Furman vs. Wall, 8 Wall., 44.
8 Wh., 1; 1 How., 311; 6 How., 301.

II.

The contract having been made under the authority of the Legislature by the consolidated city of New Orleans, and the city of New Orleans having had an adequate consideration for the bonds, and the bonds having been accredited by the security of the pledge made in the sections of the Statute of 1852, and in Statutes subsequently adopted, the State is prohibited, by the 10th section of the first article of the contract, from passing any law to impair the obligation of the contract.

Sabatier vs. Creditors, 6 Martin N. S., 585.
Von Hoffman vs. Quincy, 4 Wall., 535.
Ohio L. & T. Co. vs. Debolt, 16 How., 416–428.
Fletcher vs. Peck, 6 Cr., 86.

III.

The section of the Act 31 of 1876, copied in the petition, which directs that no tax shall be levied in 1876, or any year thereafter, to pay the interest or principal of any bonds but those authorized by the terms of that Act, and repeals all laws which required or authorized such assessments, is a plain violation of the contract with the holders of the consolidated debt of the city of New Orleans as contained in the sections cited.

Pomeroy Con. Law, secs. 611–614.

IV.

The Code of Practice of Louisiana prescribes to Courts the mode of directing the performance of some specific Act, and confers authority upon them to apply it to public officers and corporations. It has been frequently applied in the procedure of the State, and the scope of the writ of *mandamus* is said to be larger there than in other States.

C. P. 254, arts. 829, 830, 832, 834.
Hatch vs. City Bank, 1 Rob., 470.
Watts vs. Police Jury, 11 Ann., 141.

This writ is used at common law to compel assessment of county, borough, poor rates, and is the only writ available for the purpose.

Lord Ray R., 1479.
Grant on Corp., 490.
Tapp on Mand., 81.

This Court has, in numerous cases, sanctioned its use for the same purpose.

Board vs. Aspinwall, 24 How., 376.
Rigg vs. Johnson, 6 Wall., 166.
United States vs. Memphis, 97 U. S. Rep., 293.
Ranger vs. New Orleans, 98 U. S. Rep.
Burr on Tax, 453.
High on Rem., secs. 382, 387.

V.

The law of procedure in Louisiana has provided no other form of action to enforce this contract. The duty to be performed by the corporation is a distinct, specific and single act. The time for the performance is determined. No other officers can perform the act, and the consequences of non-performance affect the whole community as well as the bondholders.

The suit must be brought in this form. The sum of six hundred and fifty thousand dollars to be collected, is to be paid for coupons upon some thousand of bonds, and the surplus is to be expended in the purchase of bonds, after advertisement, and upon a special contract with the lowest bidders. The money cannot be obtained and distributed except the Commissioners of the consolidated debt assist. The compulsory order may be brought upon the demand of a single bondholder, but the benefit

enures to all. No bondholder can obtain a *mandamus* with or without a judgment for his aliquot part merely.

Douglass vs. Chatham, 41 Conn., 233.
Burr on Tax, 453.
Dill., Mun. Corp., sec. 688.
Cooley on Tax, 524, 525.
Rex vs. Borough of Midhurst, 1 Wilson, 283.

VI.

The section seven of Act No. 31, copied into the petition and pleaded by the defendants, comprises two enactments which have a direct antagonism to the contract and commands embodied in the 37th section of the "Act to consolidate the city of New Orleans and provide for the government and administration of its affairs." This Act directed the City Council, in January of every year, to pass an ordinance for the collection of a special tax, to be called the consolidated loan tax, to be applied to the payment of a consolidated debt of New Orleans which the city might, and did thereafter, contract upon the credit and confidence this enactment inspired. The section seven of 1876 commands that no tax shall, in that or any year to come, be collected for the payment of bonds, or interest on bonds, of this issue.

The Act of 1852 prescribed that, unless the ordinance for the collection of the special tax was passed as directed, "all ordinances, resolutions and acts passed by the City Council in that year shall be null and void, unless the ordinance imposing the special loan tax shall have been previously passed." The Act of 1876 enacts that all existing laws requiring or authorizing the City Council to levy any tax for bonds or interest on bonds of this issue be and are repealed.

And the General Assembly, to manifest the intensity of their purpose, proceeded to mutilate the jurisdiction of the judicial tribunals and pronounces an interdict upon them in this remark-

able language: "It shall be hereafter incompetent for any Court to *mandamus* the officers of the city to levy and collect any interest-tax, (other than that provided in this Act,) *or in case of such mandamus*, by a receiver or otherwise, *to direct the levy and collection of any such tax*." Thus it was that

> —— "dishonour
> Mangles true judgment, and bereaves the State
> Of that integrity which should become it;
> Not having the power to do the good it would
> For the ill which doth control it."

The eloquent opinion of the Supreme Court of Connecticut is referred to as a proper comment upon this Act.

Savings Society vs. New London, 29 Conn., 173, 193–194.

VII.

We can scarcely open a volume of the Reports of this Court during the last decade without finding a case in which the principle of such Acts is not sternly rebuked and their operation obstructed in the name of the Constitution of the United States, and in the vindication of its supreme commands. We extract from Von Hoffman vs. Quincy, 4 Wall., 535, a paragraph which embodies the law upon facts that are analogous to those appearing in this cause:

"*When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes, sufficient in amount to meet the interest, as it accrued, from time to time, upon the entire debt. But for the Act of 1863, there would be no difficulty in enforcing them. The amount permitted to be collected, by that Act, will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency, the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled.* A RIGHT WITHOUT A REMEDY,

IS, AS IF IT WERE NOT. *For every beneficial purposes, it may be said not to exist.*"

"IT IS WELL SETTLED, THAT A STATE MAY DISABLE ITSELF FROM EXERCISING ITS TAXING POWER IN PARTICULAR CASES— 7 Cranch, 166; 18 How., 331; 16 How., 331.

"IT IS EQUALLY CLEAR THAT, WHERE A STATE HAS AUTHORIZED A MUNICIPAL CORPORATION TO CONTRACT AND TO EXERCISE THE POWER OF LOCAL TAXATION, TO THE EXTENT NECESSARY TO MEET ITS ENGAGEMENT; THE POWER OF TAXATION THUS GIVEN CANNOT BE WITHDRAWN UNTIL THE CONTRACT IS SATISFIED. THE STATE AND THE CORPORATION, IN SUCH CASES, ARE EQUALLY BOUND. THE POWER GIVEN BECOMES A TRUST, WHICH THE DONOR CANNOT ANNUL AND WHICH THE DONEE IS BOUND TO EXECUTE, AND NEITHER THE STATE, NOR THE CORPORATION, CAN ANY MORE IMPAIR THE OBLIGATION OF THE CONTRACT THAN IN ANY OTHER."

10 Cal., 570; 3 Sandford, 555. (Also, 1 Mo., 164)

"THE LAWS REQUIRING TAXES TO THE REQUISITE AMOUNT TO BE COLLECTED IN FORCE WHEN THE BONDS WERE ISSUED, ARE STILL IN FORCE FOR ALL THE PURPOSES OF THIS CASE. THE ACT OF 1863, IS, SO FAR AS IT AFFECTS THESE BONDS, A NULLITY.

ED. BERMUDEZ,
J. A. CAMPBELL,
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